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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, INC., *et al.*,
Petitioners

v.

REDERIAKTIEBOLAGET TRANSATLANTIC,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Does a court of appeals lose its jurisdiction under 28 U.S.C. Secs. 1291 and 2106, to review a final judgment of a district court because the Federal Maritime Commission, during a temporary stay of the district court case in which the judgment was entered, ruled that the claim before the district court was not illegal under a regulatory statute?

2. Where the Commission has approved an agreement among competing marine terminals authorizing industry-fixed terminal charges against cargo interests, may the terminals, when the cargo interests resist payment, shift the incidence of such charges to non-assenting ocean carriers without a Commission-approved agreement covering such shift?

3. Can the rights and duties of a steamship carrier with respect to the cargo it carries, set forth in a tariff which a statute renders legally binding, be superseded by a conflicting tariff of marine terminal operators, published pursuant to no official mandate?

STATUTES INVOLVED

The case involves, in addition to the statutes on which the Petitioners and the Government rely, Secs. 1291, 2106 and 1336(b) of Title 28, U.S. Code, and Sec. 18(b)(1) and (3) of the Shipping Act, 46 U.S.C. 817(b)(1) and (3) which provide:

28 U.S.C. Sec. 1291. *Final decisions of district courts.*

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. Sec. 2106. *Determination.*

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. Sec. 1336(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

Shipping Act, § 18(b)(1) & (3).

(1) From and after ninety days following October 3, 1961 every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge may be made therefor. The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count, or to cargo which is softwood lumber. As used in this paragraph, the term "softwood lumber" means softwood lumber not further manufactured than passing lengthwise through a standard planing machine and crosscut to length, logs, poles, piling, and ties, including such articles preservatively

treated, or bored, or framed, but not including plywood or finished articles knocked down or set up.

* * *

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege of facility, except in accordance with such tariffs. . . .

COUNTERSTATEMENT OF THE CASE

We accept in general outline the statement of the case by Petitioners and the Government, subject to the following additions and exceptions.

As to Petitioners' Statement (Brief, 7-18).

1. The trial judge did not permit the defendants to petition the Maritime Commission for determination of "the" issues, but only some of the issues—i.e., whether the plaintiffs' terminal charges were lawful and reasonable under the Shipping Act. (App. I, 23-24). The answer of the original defendants in the district court (App. I, 15-17) and the separate answer of Respondent as intervening defendant (App. I, 29-32) raised other issues not tendered to the Commission or not within its competence. These issues were (a) a contract question as to whether non-assenting vessel operators were bound by the new terminal charges (App. I, 16); and (b) a question whether vessel-operator tariffs, legally binding under the Shipping Act, did not take precedence over conflicting terminal tariffs published without statutory sanction (App. I, 31-32).

2. The terminal "tariff" (Brief, 8) was merely a uniform price list of competitors, sanctioned only to the extent covered by their private agreement, approved by the Commission under Sec. 15 of the Shipping Act, 46 U.S.C. Sec. 814 (App. I, 31, 35-36).[1] Approval conferred antitrust exemption.

3. The agreement of the terminals (App. II, 5-10) was not a general rate-fixing license. Under Article THIRD, it authorized joint action only as to specified matters, and "services, facilities, rates, and charges incidental thereto." The only matter here relevant was "wharf demurrage" (App. II, 6), meticulously defined in the tariff as a charge *against cargo* remaining on a wharf beyond "free time" (App. II, 18), and uniformly defined as a charge against cargo by the Commission as well.[2] The same definition as a charge against cargo was retained in the tariff even after wharf demurrage on strike-bound cargo was renamed in the tariff under the euphemism "strike storage" (App. II, 20), and after the terminals sought to transfer the charge from cargo to vessel (App. II, 43, 42, 46).[3] Petitioners' statement (Brief, 21) that the terms of Agreement 8785 "do

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[1]At the time of the dispute involved here (January-February, 1965–App. I, 12) no statute and no regulation called for the filing of terminal tariffs. Many months later (October, 1965), the Commission issued its General Order 15, requiring that terminal tariffs be filed (46 C.F.R. Sec. 533); but even this order omits any mandate that the terms of such tariffs be observed.

[2]*Storage of Import Property*, 1 U.S.M.C. 676-678 (1937); *Practices of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588, 603, 609 (1941), aff'd sub nom., *California v. United States*, 320 U.S. 577 (1944); *Terminal Rate Increases–Puget Sound Ports*, 3 U.S.M.C. 21, 24-25 (1948); *Terminal Rate Structure–California Ports*, 3 U.S.M.C. 57, 58, 78 (1948); *Free Time and Demurrage Charges at New York*, 3 U.S.M.C. 89, 107, 109 (1948); *Terminal Rate Structure–Pacific Northwest Ports*, 5 F.M.B. 53 (1956).

[3]The first tariff under Agreement 8785 was filed to take effect June 15, 1962 (App. II, 12). That tariff defined wharf demurrage as follows:

not themselves specify the incidence of any charges" is thus incorrect, because the charge for wharf demurrage, being the only relevant charge authorized by the agreement, was by definition and official ruling a charge against cargo.

> "The term *Wharf Demurrage* refers to the charge levied against cargo remaining on a pier or wharf after the expiration of free time." (App. II, 19).

and, in setting forth conditions applicable to the payment of wharf demurrage charges, stated:

> "Item 4.–*Wharf Demurrage*
>
> D. Wharf Demurrage will be assessed against the consignee of import cargo or the shipper of export cargo as shown on the original manifest or bill of lading. The Terminal may refuse delivery of cargo on wharf demurrage until all wharf demurrage charges are paid.
>
> E. Cargo prevented from removal by factors beyond consignee's control such as strikes, weather conditions, or similar situations affecting the entire Port area:
>
> Per 100 lbs. per day for each day after expiration of free time that the situation exists.–$.01 (App. II, 44).

By a tariff revision effective September 30, 1964, the terminals changed paragraph E of "Item 4–Wharfage Demurrage" to provide that the demurrage on cargo immobilized by strikes would be assessed to the vessel rather than to the consignee or shipper. The charge was still labelled "Wharf Demurrage." The new item provided (App. II, 43):

> "Wharf demurrage assessed on cargo prevented from removal from the Terminal will be assessed to the vessel when the vessel's employees, or employees of the agent of the vessel, or firms employed by either the agent or the vessel, are on strike."

By a further tariff revision effective December 18, 1964, the terminals (1) further amended paragraph E by changing the words "wharf demurrage" to the words "strike storage" (App. II, 42), and (2) inserted a definition of "strike storage" in the definition section of the tariff which defined that item as a "charge assessed *against cargo* on the pier at the commencement of a strike which prevents receipt or delivery of cargo." (Italics supplied; App. II, 20). Finally, by a tariff revision effective January 21, 1965, the terminals transferred paragraph E from Item 4, titled "Wharf Demurrage", to a new Item 11, titled "Strike Storage." The text was left unchanged (App. II, 46).

As to the Government's Statement (Brief, 3-9).

1. The Government persists, in the Commission's tradition, in refusing to quote the language of the terminal agreement which defines its coverage. The Government states (Brief, 3), that the agreement "relates generally to 'rates . . . and charges . . . for furnishing . . . terminal facilities in the Port of Boston. . . .'" That is an expurgated sampling of its preamble. The substantive clause defining coverage, which the Government ignores, is Article THIRD, which provides [App. II, 6]:

> This agreement shall cover the following subject matters and all services, facilities, rates, and charges incidental thereto:—wharfage, dockage, free time, wharf demurrage, usage charges, passenger charges, water, electricity.

2. In discussing free time—the period for removing cargo without penalty—the Government states (Brief, 3):

> Five days (excluding Saturdays, Sundays, and holidays) is the period deemed reasonably necessary in the Port of Boston for the consignee to remove import cargo and is known as "free time."

The Government offers no hint as to who deems a five-day period reasonably necessary. That the terminals deem it so, their tariff plainly reveals (App. II, 33). But their tariff, unofficial and non-binding, conflicts with the official, legally-binding tariff of Respondent, which requires consignees to receive their cargo upon discharge (App. II, 78-80).[4] The Commission has no general rule on free time, and no rule at all establishing five days or any other period of free time at Boston. It has, however, ruled that the specification of free time is a carrier, rather than a terminal responsibility.[5]

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[4]The statute which requires ocean carriers to file tariffs and obey their terms is Sec. 18(b) of the Shipping Act, 46 U.S.C. 817(b)(1) and (3).

[5]*Free Time and Demurrage Charges on Export Cargo* (Doc. 68-9)—opinion denying reconsideration, June 30, 1970 (not yet reported). The Commission said (Mimeograph Opinion, p. 5):

ANOMALIES OF THIS CASE

This case appears to be a one-of-a-kind phenomenon, presenting a liberal sampling of absurdities which flow from uncritical subservience to unexamined dogma. If the contentions of the Petitioners and the Government should lead to a judgment here reversing the court of appeals and reinstating the judgment of the district court–

1. A decision of the Federal Maritime Commission in ostensible conflict with a subsequent decision of this Court (*Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261 (1968)), would stand uncorrected and uncorrectible by judicial process–making the Commission a tribunal of last resort in construing this court's judgment.

2. The district court, in a case presenting issues broader than those referred or referable to the Maritime Commission, would become the Commission's rubber stamp through compulsory adoption of the Commission's decision even if that decision was wrong when made or became wrong in the light of this court's supervening pronouncement.

3. District court issues beyond the Commission's jurisdiction would either be denied adjudication entirely, or would necessitate double appeals–one from the agency and one from the district court–in a mockery of efficient procedure.

4. The court of appeals having jurisdiction to review the judgments of district courts in its own circuit would lose that basic function–raising a question as to why the "primary jurisdiction" of an administrative agency to decide a narrow range of regulatory issues is so far inviolate that it may be invoked to extinguish the primary jurisdiction of

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"Since the obligation to furnish free time is basically that of the common carrier (see e.g. *American President Lines, Ltd. v. Federal Maritime Board*, 317 F.2d 887, 888, D.C. Cir. (1962)) to the extent that such carrier adopts and publishes free time regulations, those tariffs rather than any tariffs adopted by terminal operators will be applicable."

courts of appeals to review the decisions of lower federal courts.[6]

The Government suggests (Brief, 15, 28, 30) that a proper disposition of this case might be to order a further district court stay, with a new reference to the Commission for consideration in the light of *Volkswagen*. This contention is made in parallel with a vigorous defense (Brief, 28) of the Commission for rejecting Respondents' petition for reconsideration, filed on that identical ground (App. II,

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[6]Petitioners and the Government might reply that the Commission decision was controlling only as to issues actually and properly referred to the Commission. The district court, however, drew no such distinction; it treated the Commission's decision as conclusive of the whole case. If, however, the Commission decision leaves some issues open for the district court's resolution, the following results ensue:

(a) The loser before the Commission could appeal to a court of appeals empowered to review the Commission (with a certiorari petition to the Supreme Court also possible);
(b) The result of that appeal would be certified to the district court;
(c) The district court would try the remaining issues and enter judgment;
(d) The loser before the district court could appeal to the court of appeals empowered to review such district court (with a certiorari petition to the Supreme Court also possible).
(e) Judgment would be entered by the district court on the ensuing mandate.

The result would be two trials and two parallel lines of appeal to decide one case, expanding the day-in-court concept to two days in multiple courts—a super-cumbrous litigation formula. Compare Consolo v. Federal Maritime Commission, 383 U.S. 607 (1966).

The theater-of-the-absurd aspect of any such litigating marathon is intensified by the possibility that the appeal from the district court might be brought before the same court of appeals as the appeal from the Commission. In this case, the court of appeals for the first circuit would have qualified to review the Commission on petition of the losing parties because Boston was their business headquarters. (28 U.S.C. 2343). An appeal from the district court would necessarily be heard in the same circuit. Our adversaries do not explain why justice is served by requiring two appeals when one will suffice.

77). The Government thus compounds the anomalies recited above in suggesting reconsideration before the agency which declined—rightly, the Government says—even to receive for filing a reconsideration petition two years ago (App. II, 69-77). What the Government proposes is virtually psychedelic in its twisted logic: a re-filing in 1970 of a reconsideration petition which was too late in 1968.

Another matter overlooked by both the Petitioners and the Government is the absence of effective means to compel further Commission action. Since the Commission is not under review here, and is not a party to the case, this court's mandate will not run against the Commission. The district court could, of course, be directed to stay its judgment while the parties went to the Commission once again. But if the Commission should stand its ground by again declining to reopen, the proceedings would be at a dead halt everywhere.

SUMMARY OF ARGUMENT

I.

The Administrative Orders Review Act, 28 U.S.C. Sec. 2341 ff., provides for review of most final orders of the Maritime Commission in a court of appeals. This provision, read literally, means that an F.M.C. order in a case referred by a district court may be appealed to a court of appeals before the case proceeds to judgment in the district court which referred it—and such judgment may again be appealed. Sec. 31 of the Shipping Act, 46 U.S.C. Sec. 830, provides that the procedure to review F.M.C. orders "shall, except as otherwise provided, be the same as in similar suits in respect of orders of the Interstate Commerce Commission."

An I.C.C. order in a case referred by a district court is reviewable by the referring court. 28 U.S.C. Sec. 1336(b). When Congress passed Sec. 1336(b) it recognized that I.C.C.

orders issued in referred cases present the special problem of multiple proceedings, and created a special procedure for its solution. The same problem exists relative to the review of F.M.C. orders, and the policy of Sec. 31 of the Shipping Act dictates the same solution. Section 31, tying F.M.C. procedure to I.C.C. procedure, can and should be read as incorporating 28 U.S.C. Sec. 1336(b).

The district court was not obliged to refer any part of the case to the Commission: the Commission lacked authority to grant the relief which Plaintiffs (Petitioners) sought in court. The Commission therefore had neither primary jurisdiction nor any jurisdiction of the case. The district court's reference was wholly discretionary, and the court was not bound by the Commission's ruling.

II.

Moreover, the Commission order was not reviewable under the Administrative Orders Review Act because it was not a final order. It neither established nor extinguished any rights, having no effect independent of such further action as the district court might take. The agency order was equivalent to a court order denying a motion to dismiss a complaint. Such orders are not final, and are not appealable.

III.

In any event, whatever the effect of the Commission order on the parties to the Commission proceeding, it was ineffective as to Respondent since Respondent was not a party before the Commission. Respondent did not become a party to the court case until admitted to intervention after the Commission proceeding had terminated. Respondent was not bound by the participation of its Boston agent before the Commission: the district court permitted intervention on the uncontested showing of Respondent that such representation was inadequate to protect Respondent's interest. Non-parties are not bound by administrative decisions in adversary proceedings.

IV.

The court of appeals correctly applied *Volkswagen*. It held that a shift in the incidence of wharf demurrage charges from the cargo to the vessel which had carried it could not be disregarded as "de minimis or routine". Change of incidence in the absence of Commission approval is precisely what *Volkswagen* prohibited.

V.

Volkswagen aside, the district court erroneously declined to pass on the conflict between the tariff of the terminal association and that of Respondent. Respondent is a common carrier. Common carriers are required by the Shipping Act, Sec. 18(b)(1) and (3), 46 U.S.C. Sec. 817(b)(1) and (3), to file tariffs and to observe their terms without deviation. Such tariffs have the force of law.

The terminal tariff was filed only in accordance with a private agreement among competing terminal operators. Terminal operators are not required by statute to file tariffs, and their tariffs do not have the force of law. Since Respondent's tariff prohibited the payment of the terminal charges for which petitioners sued, and was legally binding, the district court judgment requiring payment of such charges by Respondent was in conflict with the Shipping Act and was properly reversed.

ARGUMENT

I. THE COMMISSION ORDER WAS REVIEWABLE BY THE DISTRICT COURT

(A) The Interstate Commerce Commission Analogy

In *Pennsylvania Railroad Co. v. United States,* 363 U.S. 202 (1960), this court held that where the Court of Claims had referred to the Interstate Commerce Commission a question as to the reasonableness of railroad rates and the Commission had found them unreasonable, such finding was exclusively reviewable in a district court, by virtue of 28 U.S.C. Sec. 1336, as it then stood. The Court of Claims was held bound to stay its proceedings until the completion of district court review.

Congress reacted to this decision by passing in 1964, at the Attorney General's request, Public Law 88-513, adding to Sec. 1336 (among other provisions) the following paragraph:

> (b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

The Attorney General's letter seeking the amendment explained that under existing law, the reviewing district court would always be a different court from the referring court when the reference came from the Court of Claims, and would frequently be a different court (because of venue restrictions) even when the reference stemmed from a district court. In this connection he referred to "25 cases pending in various district courts while other district courts hear appeals from orders of the Interstate Commerce Commission."[7] He characterized this state of affairs as an "unsa-

[7]Senate Report 1394, 1964 U.S. Code Cong. & Admin. News, Vol. 2, p. 3237.

tisfactory and inefficient procedure"—in derogation of virtually every contention made by the Government here. The Commission's chairman supported the Attorney General, citing *Pennsylvania Railroad* as the source of the problem.[8] The Judicial Conference of the United States added its approval of the Attorney General's solution, viewing the proposal as "a proper one to meet a procedural difficulty which needs correction."[9]

Since the problem which *Pennsylvania Railroad* highlighted and Sec. 1336(b) relieved is identical in principle to the problem here involved, we believe that the amendment and the related legislative history constitute authentic declarations of legislative policy for the court's guidance in this case.

The Government relegates Sec. 1336(b) to a footnote (No. 12, Brief, p. 22) and denigrates its relevance on the ground that it pertains only to the I.C.C. and "Congress would have expressly so provided in the case of the F.M.C. . . . if it had intended to allow such collateral review." We deem this conclusion unperceptive and incorrect.

We do not claim that a statute establishing procedure for one agency applies inherently to another, but we do contend that Sec. 1336(b) in conjunction with Sec. 31 of the Shipping Act (46 U.S.C. Sec. 830) furnishes both reason and opportunity for treating the Maritime Commission and the Interstate Commerce Commission alike in the matter of jurisdiction to review referred issues. Section 31 of the Shipping Act provides:

> The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

[8]Id., p. 3238.

[9]Id., p. 3238.

The Government claims that Sec. 31 was superseded by the Administrative Orders Review Act of 1950, 28 U.S.C. Sec. 2341 ff., and has no further vitality. This court held otherwise in *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966), stating (p. 613):

> Section 830 of Title 46 (Sec. 31 of the Shipping Act, 1916, 39 Stat. 738, as amended), in turn, says that, "except as otherwise provided", orders of the Federal Maritime Board are reviewable pursuant to the same procedures as are available "in similar suits in regard to orders of the Interstate Commerce Commission **." Accordingly, if pursuant to provisions in the Interstate Commerce Act a shipper can bring a direct review proceeding to challenge the adequacy of a reparation award issued by the Interstate Commerce Commission, he should be permitted to bring a similar proceeding to challenge the adequacy of a reparation award from the Federal Maritime Commission, subject of course to any special provisions applicable to maritime cases such as the provision in Sec. 2 of the Administrative Orders Review Act that direct review proceedings shall be conducted in the courts of appeals rather than the district courts.

We read this passage as a recognition that even after the Administrative Orders Review Act, the broad Shipping Act policy of parallelism between F.M.C. and I.C.C. review procedures continued in force. The question now presented, as we view it, is whether the questions tendered by the review of referred maritime cases should be answered by literal (perhaps over-literal) application of the Review Act as regards the reviewing tribunal, or by observance of the procedural-uniformity precept of the Shipping Act. As the Attorney General recognized in sponsoring 28 U.S.C. Sec. 1336(b) and Congress recognized in passing it, the referred case presents a special problem and calls for a special solution. While a case which had been referred to the I.C.C. (and reached this court in *Pennsylvania Railroad Co.*) first brought the problem to public notice, the involvement of the I.C.C. rather than some other agency was pure happen-

stance. The solution spelled out in Section 1336(b) was in no sense peculiarly appropriate to I.C.C. cases. It was equally needed and equally workable as regards referred F.M.C. cases and should be applied to them if any provision of law permits such application. In our view, Sec. 31 of the Shipping Act, in view of its strong policy of uniformity, does permit such application in the interest of sane litigation practice. In specific terms, this means the application of 28 U.S.C. Sec. 1336(b) to maritime cases.

Such application, we concede, calls for a measure of reconciliation between a policy enactment pointing one way and a procedural statute (the Review Act) pointing another—an assignment by no means beyond the competence and experience of this court.[10] The statutes here involved comprise a legislative muddle which invites rationalization by this court pending Congressional attention. The muddle and the need for legislative treatment were recognized in *Interstate Commerce Commission v. Atlantic Coast Line*, 383 U.S. 576 (1966) where the court said (note 4, p. 586):

> As is readily apparent from this opinion, the statutory provisions governing this case and the companion case, Consolo, 383 U.S. 607, 86 S. Ct. 1018, are an historical patchwork subject to more than one interpretation. The entire matter is surely ripe for congressional consideration, for it is of continuing significance and the competing considerations of yesterday may not be those of overriding importance today.

In dealing with problems of F.M.C. and I.C.C. review, this court has recurrently accepted the dictates of broad legislative policy over narrow legal literalism where inconsistencies were found among the pertinent statutes. In *United States v. Interstate Commerce Commission*, 337 U.S. 426 (1949), the court held that a shipper's suit to review an I.C.C. order denying reparation should, as a matter of policy, be heard by a one-judge district court al-

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[10]See Addison v. Holly Hill Fruit Products, 322 U.S. 607, 620-22 (1944).

though the Urgent Deficiencies Act in terms called for a three-judge court (337 U.S. at 443). The court reasoned that since a one-judge court was provided by statute to enforce an I.C.C. order for payment of money damages, a one-judge court should suffice to review the denial of such an order, although the literal statutory language called for three-judge procedure.

In *Interstate Commerce Commission v. Atlantic Coast Line*, 383 U.S. 576 (1966), this court held that a carrier against whom the I.C.C. had issued a reparation order could not challenge it in an independent review action but could do so by way of cross-action in an enforcement suit instituted by the shipper. The decision, resting in part on Sec. 16(2) of the Interstate Commerce Act (49 U.S.C. Sec. 16(2)), was expressly based on "the policy underlying that section", notwithstanding that Section 17(9) (49 U.S.C. Sec. 17(9)) authorized, without restriction, suits "to enforce, enjoin, suspend, or set aside I.C.C. orders" in accordance with relevant procedural statutes (383 U.S. at p. 589).

In *Consolo v. Federal Maritime Commission*, 383 U.S. 607(1966), the court determined—once more on pure policy grounds—that although a carrier normally could not challenge a reparation order by a proceeding for direct review, he could do so by cross-action in a suit brought by a shipper to review such order as insufficient. The court said that where the shipper was already in the reviewing court, "it would make little sense" to relegate the carrier to a different court (383 U.S. at 616-17). It also cited considerations of "judicial economy and fairness" (Id., n. 14).

Since this court, in the field under review, has commonly deemed itself free to emphasize policy at the expense of interpretative literalism, we ask that it now weigh, against the arguments of the Petitioners and the Government, the policy dictates of the pertinent statutes.

The Administrative Orders Review Act is derived from the Hobbs Act, enacted in 1950 and initially codified in 5 U.S.C. Sec. 1031 ff. Its purpose is shown by House Re-

port No. 2122, 81st Cong., 1950 U.S. Code Cong. & Admin. News, p. 4303) to have been the relief (a) of District Courts from the cumbrous three-judge procedure prescribed for the review of particular types of orders of various agencies, and (b) of the Supreme Court from the burden of passing on appeals taken as of right (rather than by petition for certiorari) from judgments of such three-judge district tribunals (pp. 3304-05). The thrust of the Act was to conserve judicial manpower. Congress had no thought of creating a class of cases in which F.M.C. review would call for more judges than would I.C.C. review–which would be the consequence of a ruling here sending the case back to the Maritime Commission,[11] thence to the Court of Appeals for the District of Columbia (and perhaps this court), thence to the district court for trial of the non-referred issues, thence to the Court of Appeals for the First Circuit (and perhaps again to this court).

If any such judicial whirlabout is required to decide an $8,000 claim for wharf demurrage, it results from the Administrative Orders Review Act, which was enacted solely to save the time and energy of overworked courts and judges–and the bizarre result would prove the law's genius for achieving results at odds with legislative intentions. The sponsors of the Review Act could have had no thought that in substituting courts of appeals for three-judge district courts in agency review matters, they would be doubling or trebling or quadrupling the burden of litigating simple judicial claims with maritime overtones, or rendering the disposition of referred maritime cases permanently more complex than their I.C.C. counterparts.

When this court has found rational grounds for letting one judge do the work of three, it has seized the opportunity to make the one-for-three substitution. In *United States v. Interstate Commerce Commission*, 337 U.S. 426, the court said (p. 443):

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[11] The I.C.C. was covered in the first draft of the Hobbs bill, but was later excluded in deference to the agency's preference for established review procedures.

> We have frequently pointed out the importance of limiting the three-judge court procedure within its expressly stated confines. We are confident that in holding that one judge rather than three should entertain cases challenging Commission reparation orders we interpret the congressional expediting procedure and the Interstate Commerce Act in accordance with their basic purpose.

We believe that if this court interprets Sec. 31 of the Shipping Act as incorporating 28 U.S.C. Sec. 1336(b), its decision will be in full conformity with the policy of those two statutes as well as the policy of the Administrative Orders Review Act.

(B) Primary Jurisdiction

The district judge entered a pre-trial order staying the case to let defendants seek a Commission determination of the lawfulness and reasonableness of "the practices under item 11 of Section III of the plaintiffs' tariff", stating that the Commission "has initial and primary jurisdiction" of such practices. The order called for a report to the court within 60 days, and announced that the court "will retain jurisdiction of the within proceeding". (App. I, 24). The district court defendants then filed with the Commission a complaint which led to the Commission decision set forth in App. II, 49-67. The Commission required an amendment of the terminal tariff in a detail not relevant here (App. II, 64-65) but ruled that as to cargo which had been discharged onto a wharf and was still on free time when immobilized by a strike, demurrage accruing during the strike was lawfully assessable to the vessel rather than the importer (App. II, 61) and that the reallocation of the charge from cargo to vessel did not require approval under Sec. 15 of the Shipping Act because it did not constitute a "new agreement" (App. II, 56). The effect of the decision in terms of the district court's order of "reference"[12]

[12] "Reference" is in quotation marks because the court did not actually refer any controversy to the Commission. It merely stayed the

was merely to determine that the tariff, as here relevant, was not unlawful or unreasonable. The Commission decision, even if binding, settled nothing in the court case except to deprive the defendants of their defense of illegality in the court suit.

The district court, however, said in its opinion (App. I, 40, 42):

> The matters presented by the complaint are within the primary jurisdiction of the F.M.C. If defendants were not content with the determination of the F.M.C. it was incumbent on them to intervene and to appeal seasonably to the appropriate United States Court, here the Court of Appeals of the District of Columbia. This Court is not the appropriate tribunal to review directly or indirectly the F.M.C..
>
> Even if this Court did undertake a review, it could set aside or ignore the determinations of the F.M.C. only if they were without substantial evidentiary basis, or contrary to the statute or the Constitution. . . .
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> * * *
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> The F.M.C.'s report cannot be regarded as merely advisory. It was a definite decision. And it was a correct one.

We contend that the district court decision was wrong (a) as to the fact of primary jurisdiction, and (b) as to its consequences.[13]

In holding that "The matters presented by the complaint are within the primary jurisdiction of the F.M.C.", the district court omitted to observe that the Commission could not award any part of the relief sought in court. The plaintiffs in court sought a money judgment on a debt (App. I, 11). They could secure no such remedy from the Commission for two reasons: (a) the plaintiffs in court

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case while the defendants sought a Commission ruling on lawfulness and reasonableness.

[13]The court of appeals did not discuss the binding effect of the Commission decision except to say that it could not bind non-parties (App. I, 46, 51)–a point discussed infra, pp. 28-30.

were the *defendants* before the Commission (App. II, 49); and (b) the Commission has no power to enforce debt collections, but only to award reparation for violations of the Shipping Act under Sec. 22 (46 U.S.C. Sec. 821)—of which none were charged against the defendants in the Commission case. See *Prince Line v. American Paper Exports*, 55 F.2d 1053, 1056 (2d Cir., 1932). Moreover, the court case involved issues such as defendants' non-assent to the plaintiffs' charges which were clearly beyond Commission competence. In these circumstances, the court, if privileged to refer the case to the Commission, was not obliged to do so; but having done so, was not bound by the Commission's ruling. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951).

In *Montana-Dakota*, this court, in a 5-4 decision, declined to order reference to the Power Commission of an issue in a controversy which the majority deemed beyond the Commission's power to afford relief. The court felt that reference in such circumstances would be futile. It said (p. 254):

> If the court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue. But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose.

The dissenting judges agreed that neither the court nor the Power Commission could separately grant the relief sought in the court action but felt that relief could be granted by the court through the resources of court and Commission in combination. The dissenting opinion stated (pp. 263-64):

> In a variety of situations we have recently emphasized the principle that courts and agencies "are to be deemed collaborative instrumentalities of justice". United States v. Morgan, 313 U.S. 409, 422

> . . . To that end it is established practice that courts may entertain actions brought before them, but call to their aid the appropriate administrative agency on questions within its administrative competence . . . The fact that the Federal Power Commission is not itself authorized to award damages does not disable it from advising a court on questions on which its judgment is needed. See United States v. Morgan, supra; Atlantic Coast Line R. Co. v. State of Florida, supra, 295 U.S. at page 312 . . . We see no reason why the Commission's findings should not be sought here.

The dissenters then observed that it was within the Commission's domain to decide whether the disputed rates were reasonable and if not, what rates would have been reasonable, and added (p. 265):

> The opinion of the Commission, being "only a preliminary, interim step" towards final judgment, would not be a reviewable order under Sec. 313(b) of the Act, but would be reviewed only as a part of the judgment entered by the district court. *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U.S. 591, 618 . . .[14]

Under either the majority or the dissenting opinion in *Montana-Dakota*, the Maritime Commission's ruling on lawfulness and reasonableness was non-binding on the referring court: under the majority opinion because the case should not have been referred to the Commission since the Commission could not decide it; under the minority opinion because the Commission could merely advise the referring court on a matter within the Commission's competence to consider even though beyond its power to decide.[15]

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[14]Accord: Seaboard Airline Railroad Co. v. United States, 387 F.2d 651, 656 (Ct. Cl., 1967). Cf. United States v. American Union Transport, Inc., 232 F. Supp. 700, 702-3 (D.C.N.J. 1964).

[15]The district court, besides pronouncing the Commission ruling conclusive, said that it was correct (App. I, 42). Comment on the merits was improper:

II. THE COMMISSION ORDER WAS NOT FINAL AND WAS THEREFORE REVIEWABLE ONLY AS A PART OF THE DISTRICT COURT JUDGMENT.

The Petitioners and the Government insist that the only available relief from the Commission's decision was by petition to a court of appeals under the Administrative Orders Review Act.[16] That act lodges exclusive jurisdiction in such courts only with respect to the review of "final" orders (28 U.S.C. Sec. 2342). The Commission order was, for a variety of reasons, not final.

A. The Order Neither Established Nor Extinguished Any Rights.

The statute does not specify what kinds of orders are "final" for purposes of exclusive review by the courts of appeals, but several of such courts have considered the question in Maritime Commission cases. In *Howard Terminal v. United States*, 239 F.2d 336, 337 (9th Cir., 1956),

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"Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question." Rochester Telephone Corp. v. United States, 307 U.S. 125, 146 (1939).

[16]This suggestion could not apply to Respondent, since it was not a party to the Commission case: The complainants were members of the Boston Shipping Association (App. II, 49), of which Respondent was not a member (App. I, 36). The Government accordingly claims that Respondent should have sought direct review of the Commission's refusal to accept its petition for reconsideration (Government Brief, 19). The Montship case, 295 F.2d 147, 151, cited to prove that such review was available, is not in point: it involved review of an order entered on reconsideration—not a refusal to reconsider.

The Commission's rules imposed a 30-day time limit which was apparently the basis for the Commission's rejection of the petition. 46 C.F.R. Sec. 502.261. While we believe that in view of *Volkswagen* such limit should have been waived as a matter of discretion (46 C.F.R. 502.10), we know of no authority for appealing because an agency refuses to waive its rules.

the court held that "final" in the Review Act had the same meaning as in 28 U.S.C. Sec. 1291 defining jurisdiction of courts of appeals on appeal from district courts, under which–

> . . . it has long been the rule that the judgment to be appealable "should be final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved." Collins v. Miller, 252 U.S. 364 . . .

The court thereupon dismissed a petition to review an order of the Maritime Commission which dismissed, without hearing, all but one allegation of a multiple-count complaint charging that certain agreements which had been approved by the Board under Sec. 15 of the Shipping Act were illegal. The court held that the order of dismissal was not final because it had no impact on petitioners since (a) there was no prospect that the agreements would be carried out pending Board action on the one undismissed allegation in the complaint, and (b) petitioners might prevail on that allegation, securing full relief. The court added (p. 338):

> Until petitioner has exhausted the presently pending proceedings before the Board, it is impossible to say that it will not be satisfied by the Board's action.

An identical decision in a closely-related case was made by the Court of Appeals for the District of Columbia Circuit in *Associated-Banning Co. v. United States,* 247 F.2d 557 (1957). And in *Lee v. Federal Maritime Board,* 284 F.2d 577 (9th Cir., 1960), the court refused to review a Maritime Commission order (a subpoena) for lack of finality. The *Lee* court held that an order is final for review purposes only if it "imposes an obligation, denies a right, or fixes some legal relationship which may cause irreparable injury", and concluded that the order in question "does not give rise to such legal consequences because it need not be complied with unless judicially enforced" under specified provisions of the Shipping Act.

Under these authorities, the Commission order here involved was not final because, standing alone, it had no independent effect on anyone. It held only that the defendants before the court (plaintiffs before the Commission) could not (in the Commission's view) defend the court claim on grounds of illegality under the Shipping Act. It did not hold that the court defendants could not defend on other grounds (e.g. non-assent) tendered by the court pleadings, and it constituted no augury as to who would ultimately win the court contest after all the issues were tried. Thus under *Howard Terminal* and *Associated-Banning* it was non-final because it did not dispose of all of the issues and left either side a chance to win or lose in the further court proceedings; and under *Lee*, was non-final because it was inoperative until judicially enforced.[17]

But for the district court's "primary jurisdiction" order (App. I, 23), the court defendants might have elected to raise the issue of tariff illegality by a motion to dismiss the complaint or for summary judgment. An order denying such motion would have been the judicial equivalent of the order entered by the Commission—and would have been non-appealable because orders refusing to dismiss are uniformly treated as non-final. *Southeastern Greyhound Lines v. McCafferty*, 169 F.2d 1 (6th Cir., 1948), *certiorari denied*, 335 U.S. 861; *Garden Homes, Inc. v. United States*, 200 F.2d 299 (1st Cir. 1953); *Upper Mississippi Towing Corp. v. West*, 338 F.2d 823 (8th Cir. 1964). We see no reason why an administrative order which is the equivalent of an order refusing to dismiss should be accorded attri-

[17]Even an order deemed final as against the parties to the case in which it issued would not be final (or operative) against a non-party—and Respondent was a non-party to the Commission proceeding. Moreover, the answer (App. I, 29) which it filed in the district court as an intervening defendant raised issues in addition to those pending before the court when it made its order of reference and when the Commission made its decision.

butes of finality beyond those of a corresponding order issued by a court.[18]

B. The Commission Order Was Only Contingently Operative.

In the *Rochester* case, (at pp. 129, 130), this court formulated three categories of administrative orders not judicially reviewable. The first category consisted of orders in proceedings–

> (1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission. Such a situation is presented by an attempt to review a valuation made by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order.
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> * * *
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> In group (1) the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province.

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[18]The Government cites *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*, 383 U.S. 576; *Pennsylvania R. Co. v. United States*, 363 U.S. 202; and *Rochester Telephone Corp. v. United States*, 307 U.S. 125 as proving the finality of the Maritime Commission order here involved. In each of these cases, the order under review did what the Commission order here did not do. *Atlantic Coast Line* and *Pennsylvania* involved I.C.C. orders which held particular tariff rates illegal, thus extinguishing the railroads' right to collect them. The F.C.C. order in Rochester commanded a telephone company to obey "previously formulated mandatory orders". 307 U.S. at 144. The Commission order here, in contrast, left the terminals' tariff undisturbed except in one detail not here relevant.

In *Rochester,* the court found that the F.C.C. order before it was reviewable because it commanded specific conduct of a prejudicial nature. But the *Rochester* formula was applied in *East Ohio Gas Co. v. Federal Power Commission,* 115 F.2d 385 (6th Cir., 1940) to reach an opposite result. The court said (p. 388-89):

> The order here sought to be reviewed declares the status of the petitioner as a natural gas company, but such status does not necessarily or immediately carry a direction of obedience to any mandatory order applicable to all having such status . . . The challenged order, therefore, clearly falls into group 1 of the Rochester classification."

The *Rochester* rule was predicated on the contingency of future "administrative" action, but there can be no difference in principle between future administrative action and future judicial action. It was as true in the present case as in *Ohio Gas* that the agency order did not "necessarily or immediately" carry a direction of obedience to any mandatory order. Since no one stood to gain or lose until the court should finally speak, the Commission order lacked the attributes of finality requisite to satisfy the finality test of 28 U.S.C. Sec. 2342 and thereby invest the court of appeals with exclusive reviewing authority.[19]

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[19]The Petitioners (Brief, 24) and the Government (Brief, 18) cite the Volkswagen decision, 390 U.S. 261 (1968) as proving that the procedure they advocate here was correct. This court's decision and that of the Court of Appeals for the District of Columbia Circuit (371 F.2d 747) show that the VW litigation started as a district court suit for the recovery of challenged assessments; that the suit was stayed pending FMC resolution of stated issues; and that the FMC decision was reviewed by the Court of Appeals, and finally by this court on certiorari. Neither opinion shows the terms of the district court's order of reference, and we do not know, therefore, whether the court retained jurisdiction as did the district court here. Whatever the terms of reference, it appears that the VW parties simply walked away from the district court, never to return. No jurisdictional questions were discussed in either opinion and VW cannot be read as a jurisdictional decision. It is possible, depending on what (if any) issues were raised in the district court that the whole VW

III. PETITIONER WAS NOT A PARTY TO THE COMMISSION PROCEEDINGS AND WAS NOT BOUND BY THE COMMISSION ORDER

As we emphasized in answer in the certiorari petition and Government's *amicus curiae* memorandum supporting it, the court of appeals decision seems to us to be of narrow scope, and discreetly circumscribed to avoid collision with established precepts of administrative review. As to "the binding effect of the [Commission's] *Boston Shipping* decision even though erroneous," the court said merely (App. I, 51):

> We must hold that the decision did not bind non-parties to charges sought to be imposed for services rendered prior thereto. See Columbia Broadcasting System, Inc. v. United States, 1942, 316 U.S. 407, 418; Davis, 2 Administrative Law Treatise Sec. 18.05. Any other conclusion would destroy the statutory requirement.

The citations for this proposition support it fully. Davis states at the place indicated:

> "Under the traditional rules of res judicata a decision is binding only upon parties to the decision and those in privity with them."

Columbia Broadcasting differentiates rules made in the exercise of rule-making power from adjudicatory orders, stating (316 U.S. at 418) that general rules are generally binding–

> Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding . . .

In *National Van Lines v. United States*, 326 F.2d 363, 373 (7th Cir., 1964), the court held that in a railroad suit in court against the Government for recovery of allegedly

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controversy was determined by the FMC. No claim was made that the Commission's VW decision was binding on any non-party.

nwarranted freight deductions, an I.C.C. ruling could be sed as prima facie evidence against the carriers "since both he carriers and the Government were parties to the Commission proceeding." As to carriers not parties to the proceeding, the court held that the I.C.C. ruling served merely s guidance to the court hearing the suit.

The Commission itself held in *Terminal Rate Structure—Pacific Northwest Ports*, 5 F.M.B. 53, 55 that "no order entered in this proceeding may bind terminals which have not been made parties hereto." We assume that a similar rule applies to carriers. See also 5 F.M.B. at 58.

These authorities seem to leave no room to question the ruling that Respondent was not bound by the Commission decision unless, within the Davis formulation, Respondent can be held "in privity" with the parties before the Commission because Respondent's Boston agent, Furness, Withy & Co., was one of them. Such a ruling could be made only by ignoring the purpose of Respondent's intervention in the district court case. Intervention was permitted on Respondent's motion (App. I, 26), resting primarily on Rule 24(a)(2), F.R.C.P., which permits intervention "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." The petition showed that its representation by Furness was inadequate because (a) Furness stood to be indemnified by Respondent for any judgment against Furness and therefore had slight incentive to resist the terminals' claim; (b) Furness had reportedly paid claims on behalf of other principals (diminishing further its incentive to resist) but in what amount Respondent could not ascertain from the defendants' counsel (who was also counsel for Furness); and (c) defendants' counsel missed the filing deadline for appealing the Commission's decision.[20]

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[20] As previously noted, the late filing of a review petition showed deficient representation whether or not a timely petition would have been soundly based.

In these circumstances, Respondent cannot be deemed in privity with any party to either the court or the Commission proceedings. It was thus a non-party to all proceedings until admitted as an intervening defendant before the court in order to protect its previously unprotected interest. The district court's decision that the case stood foreclosed against the intervenor by virtue of the Commission decision was inconsistent with, and totally frustrated, the ruling allowing intervention. Reversal by the court of appeals was clearly correct.

IV. THE COURT OF APPEALS CORRECTLY APPLIED VOLKSWAGENWERK V. FEDERAL MARITIME COMMISSION, 390 U.S. 261

While Petitioners' incentive to denigrate *Volkswagen* is understandable, the Government's is not.

Section 15 of the Shipping Act gives the Maritime Commission its only tool for regulating rate-making combines and dispensing or denying antitrust exemptions. We should suppose that normal bureaucratic motivation would incite it to maintain close control over the agreements it approves and the exemptions it dispenses. We should similarly expect the federal department which enforces the antitrust laws to insist that exemptions be cautiously conferred and narrowly construed. Here, however, we find the Commission—without even disclosing its text—stretching a narrow rate agreement into a broad antitrust umbrella, and the Government's chief antitrust officer applauding the process as the Commission's lawyer.

The Government's position is in conflict with many precedents of general relevance[21] and most conspicuously with this court's decision in *Volkswagen (VW)*. *VW* was decided after the Maritime Commission had issued its decision but before the case was reactivated in the district court. It was

[21] A representative list is set forth in the Government's Brief, footnote 15, p. 35.

on the basis of *VW* that Respondent moved the Commission for reconsideration (App. I, 26). The motion was peremptorily returned by the Commission (App. II, 77), after which Respondent intervened in the district court and tendered the *VW* issue along with others (App. I, 29). The district court opinion ignored *VW* (App. I, 40) although it had become the major issue in the case.[22]

A. The Meaning of VW

In *VW*, steamship carriers, stevedoring contractors, and marine terminal operators agreed on a method for assessing charges against themselves to finance a "modernization and mechanization" fund for longshoremen. The carriers, contractors, and terminal operators involved belonged to the Pacific Maritime Association, an employer organization which negotiated contracts with labor unions. In one such labor contract, the Association agreed with the union to create the fund; the agreement as to the method of assessment, however, was not part of the contract with the union. The agreement allocating liability for the assessment provided for varying contributions to the fund for different classes of cargo. Volkswagen claimed that the allocation as to its automobiles was unreasonable. The Commission held that the allocation agreement was not subject to Sec. 15 of the Shipping Act, and the court of appeals affirmed. This court reversed, holding that the agreement allocating liability required Sec. 15 approval whether or not either (a) the agreement creating the association, or (b) the association's agreement with the union, required such approval.

The Petitioners (Brief, 34 ff) and the Government (Brief, 31 ff) seek escape from *VW* by urging that the change in incidence of the terminal rates was within the rule which

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[22]The district court held that the Maritime Commission decision was (a) binding, and (b) correct—paying no heed to the intervention of VW between the Commission and court decisions.

permits "routine" changes in the rates of shipping conferences without securing approval of each new rate. (That rule, long observed in practice, is, and at the date of *VW* was, statute law. 46 U.S.C. Sec. 814; see Government Brief, 34). An identical argument was made and rejected in *VW*. The court said (390 U.S. at 277-78):

> But the agreement with which we deal here–levying $29,000,000 over five years, binding all principal carriers, stevedoring contractors, and terminal operators on the Pacific Coast, and necessarily resulting in substantially increased stevedoring and terminal charges–was neither de minimis nor routine. We hold that this agreement was required to be filed under Sec. 15 of the Act.

The court below said in response to the same contention that "a change in incidence, as distinguished from a change in rate, seems to us anything but routine" (App. I, 51). No other conclusion would have fallen within either the letter or spirit of *VW*, or the ambit of regulatory common sense.

It is true that in this case, Agreement 8785 creating the terminal association, did require approval and was approved. It is likewise true that Agreement 8785 authorized the members to agree upon rates and charges for wharf demurrage. Since, as we show below, wharf demurrage, by historical usage recognized in an unbroken line of Commission decisions (and also by definition in the terminals' tariff) was a charge against cargo, the agreement, when approved, authorized the collection of wharf demurrage from cargo interests–i.e., shippers and consignees. But the authorization of a charge against shippers and consignees is not an authorization of a charge against carriers. When the terminals voted to make carriers liable for obligations which previously ran against cargo, they were making a new agreement respecting the incidence of a financial burden, of precisely the type for which *VW* held that approval is needed.

Under the terminals' initial tariff and a succession of amendments, wharf demurrage was chargeable 100% to the cargo and 0% to the vessel. The further agreement among

the terminals to shift liability for wharf demurrage had the effect of changing liability from 100% to 0% as against the cargo, and from 0% to 100% as against the vessel. A more radical re-allocation could not have been achieved.

The rule calling for filing and approval of agreements fixing or changing the incidence of conference rates is no formal quibble; it is fundamental to the protection of the interested public and the public interest.

When an agreement is filed with the Commission, a summary is published in the Federal Register and the public is permitted to protest or seek a hearing. See *Marine Space Enclosures v. Federal Maritime Commission*, 420 F.2d 577, 581, 587 (D.C. Cir., 1969). Obviously only that portion of the public having a recognizable interest in an agreement as publicly noticed would have reason to respond. An agreement having no discernible effect on carriers ordinarily would evoke no carrier protest. But if an agreement having no ostensible effect on carriers is later invoked, with Commission acquiescence, to fix rates which carriers must pay, the carriers automatically fall victim to a rate combine which they never had occasion to oppose. By this two-stage process of securing approval for an agreement fixing charges for one class of rate-payers and then, without approval, switching them to another, the parties to the rate combine can nullify the only element of protection which the law affords to either public or private interests affected by a maritime rate agreement.[23]

We cannot conceive of a device more efficiently designed to frustrate this court's *VW* mandate. Accordingly we ask the court to rule that *VW* requires Commission approval for the action of the terminal association in shifting the in-

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[23]The Government observes (Brief, 39 - footnote 17) that the only difference between "wharf demurrage" and "strike storage" is "the interest which is required to pay the charge." That is the only difference in most lawsuits between judgment for the plaintiff and judgment for the defendant, but we have not heard from any source but the Government that such difference is insignificant.

cidence of its wharf demurrage charges from cargo to carrier.

If Commission approval of the shift in incidence is needed, the question remains whether it was granted through approval of Agreement 8785; in other words, whether the Commission-approved agreement creating the terminal association provided cover of authority for switching the incidence of wharf demurrage from cargo to carrier. The answer is No.

B. Scope of Agreement 8785

The Commission held in its Docket 66-28 (App. II, 49) that Agreement 8785 provided cover of authority for the contested change in the incidence of the terminals' wharf demurrage charge, and that the Commission's initial approval of the agreement afforded sanction for the change. Petitioners urge (Brief, 30) that the Commission's ruling be accorded "due deference"; the Government (Brief, 18) praises the Commission for deciding what it decided "with extensive reasoning."

"Due" deference in this case is zero deference because the Commission's "extensive reasoning" was pure sham. In the course of an opinion covering 16 printed pages of the appendix, the Commission never revealed the text it was construing[24]—and neither does the Government in its brief here. Instead of quoting the four lines of type pertinent to its inquiry, it paraphrased them and distorted them in the paraphrase by stating that the agreement covered "all terminal facilities and services" (App. II, 51) when in fact it covered only specified services, and "rates and charges *incidental thereto.*" (App. II, 6; emphasis ours.) The Commission also omitted pertinent reference to any of its many decisions dealing with the incidence of wharf de-

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[24] Article THIRD of Agreement 8785. The complete article is four lines long. (App. II, 6; supra, p. 7)

murrage—each of them calling for a conclusion opposite to the conclusion reached by ignoring them.[25] We submit that a decision formulated by these processes merits a reviewing court's deep suspicion rather than the respect which the Government solicits (Brief, 37) for the agency's "informed judgment" and "expert knowledge".

1. *Commission Precedents*

Agreement 8785 (Article THIRD) permits the members of the terminal association to act in concert in establishing rates for the following services: "wharfage; dockage; free time; wharf demurrage; usage charges; passenger charges; water; electricity" and "all services, facilities, rates and charges *incidental thereto.*" (italics ours)

An unbroken line of Commission decisions dealing with and defining marine terminal operations and services, and pre-dating the Commission's approval (1962), had explicitly held that services covered by terminal wharf demurrage charges are services performed not for the vessel interest but for the cargo interest, and that the charges therefor are consequently payable by the cargo interest.[26] These precedents are cited at p. 5, n. 2, supra. In one such case, *Terminal Rate Structure—Pacific Northwest Ports,* 5 F.M.B. 53, 59 (1956), the Commission said:

> "Under tackle to tackle rates, terminals may not assess charges against carriers for services performed or facility usage incurred prior to delivery within

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[25]The Commission did cite two of its decisions (App. II, 55, footnote 7) as showing that it had jurisdiction over allocation of terminal costs between cargo and vessel, but offered no hint that in the same two cases it had recognized wharf demurrage as a charge against cargo.

[26]Contrast, for example, dockage, which is the terminal fee assessed for allowing a vessel to be moored at a berth. This fee is always assessed against the vessel (App. II, 12, 51) which must tie up at a dock in order to perform its obligation to discharge cargo.

reach of ship's tackle or subsequent to delivery at the end of ship's tackle." (5 F.M.B. at 59).

Thus, when the Commission, by approving Agreement 8785, permitted the terminals to agree upon charges for "wharf demurrage", neither the Commission, nor the parties to the agreement, nor the general maritime public, could rationally have conceived that it was authorizing an agreement of the terminal operators which would create in any measure a liability for wharf demurrage on the part of a vessel owner. No service listed in Article THIRD of Agreement 8785 other than "wharf demurrage" is relevant to the disputed charge. There is no mention in Article THIRD of "strike storage," nor would such a term have had any definable meaning under the precedents cited above which defined terminal services and operations.

Until the present controversy arose, the terminals construed their authority to agree upon rates for wharf demurrage consistently with every Commission precedent. They did not construe the authority to agree upon rates for wharf demurrage as allowing them to create a liability against the vessel interest: the tariff filed almost contemporaneously with the approval of Agreement 8785, defining every service covered by Article THIRD of such agreement, specifically defined wharf demurrage as a charge levied *against cargo*. The rate section of that same tariff provided that wharf demurrage would be payable by the "shipper of export cargo and the consignee of import cargo." (App. II, 44).

Thus, until the series of tariff changes inaugurated by the terminals in September 1964, there was no hint that Commission approval of an agreement allowing a group of marine terminal operators to agree upon charges for wharf demurrage could affect in any measure the liability of any vessel operator. The inconsistency of definitions remaining after each tariff change filed by the terminals shows that they were breaking new ground, and were having difficulty in rationalizing the imposition of their new charge against

the vessel for services furnished cargo, within any accepted category of terminal services. Thus while the first and subsequent changes stated that wharf demurrage under strike conditions would be assessed against the vessel, the tariff itself continued to define wharf demurrage as a charge against the cargo. (App. II, 18-19). Moreover, the new charge, even when retitled "strike storage," was placed in the tariff as a sub-category of wharf demurrage, and both strike storage and wharf demurrage were defined in the definition section of the tariff as charges *against the cargo.* (App. II, 42, 18, 20). Finally, when "strike storage" was removed from the wharf demurrage section of the tariff, and given its own section—a change that occurred well after Respondent's ship had departed Boston and free time on the cargo discharged from that vessel had expired—"strike storage" itself continued to be defined as a charge *against the cargo.* (App. II, 20). This series of confusing and ineffectual changes clearly demonstrates that the objective of the terminals to create a vessel liability for services performed for the cargo after its discharge, could not be effectuated without violence to even the terminals' own well-understood definitions of terminal services.

2. *Judicial Precedents.*

Our contention that Agreement 8785 did not cover the contested tariff changes is supported not only by the Commission's decisions but by a long list of court decisions holding that a mere authorization to adopt rates in concert does not provide legal cover and antitrust immunity for activities which reach significantly beyond conventional rates and routine changes upward or downward. A representative list of such cases appears in footnote 15 of the Government's brief. We need not re-cite them here but we do ask the court to observe that even on the Government's summary of their respective holdings, they refute the Government's (and Petitioners') position. *American Export Isbrandtsen Line v. Federal Maritime Commission,* 334 F.2d

185 (9th Cir., 1964) is of special interest for its approbative quotation of the following passage from the Commission's opinion there under review (334 F.2d at 198):

> "As is shown on its face, respondents' present rule, Rule 29, institutes a port equalization plan under which they absorb part of a shipper's inland freight expense equal to the difference between the cost he would incur in delivering the shipment at the loading port nearest the shipment's point of origin in the State of California, and the cost he incurs in delivering it to respondents at a more distant port (Stockton, Sacramento and specified San Francisco Bay Area ports). Respondents thus pay a portion of the shipper's expense in order to induce his cargo to their vessels at the indicated ports.
>
> "The adoption of a plan of this kind does not constitute conventional or routine rate-making among carriers. It is a new arrangement for the regulation and control of competition. Moreover, it affects third party interests such as the ports and facilities from which traffic is drawn and it obviously is not 'a pure regulation of intraconference competition'. Port equalization raises questions of possible unfairness, unjust discrimination, and detriment to commerce, all matters included in the standards for adjudging the approvability of agreements under section 15, and may bring into play the requirements of sections 16 and 17 of the Act."

The quoted language is unrecognizable as the work of the same agency which decided Docket 66-28.

Aside from its inconsistency with a long list of court and Commission precedents, the decision in Docket 66-28 possesses the attribute, twice-condemned in recent years, of being "ample in rhetoric but 'sparing in detail'." *Marine Space Enclosures, Inc. v. Federal Maritime Commission*, 420 F.2d 577, 585 (D.C. Cir., 1969); *U.S. Atlantic & Gulf/Australia - New Zealand Conference v. Federal Maritime Commission* 364 F.2d 696, 699 (D.C. Cir., 1966).

The Government (Brief, 39-40) seeks to excuse the Commission's failure to grapple with the problems before it on the ground that failure to dispense preventive justice under Section 15 can be cured after-the-fact by proceedings under other sections of the Shipping Act. The practice of retaining jurisdiction to correct current errors at a future date, as a substitute for correct regulation in the first instance was deprecated in *Marine Space Enclosures*, 420 F.2d at 588. It is no better here than there.

Lastly, the Government retreats to a last-ditch position by suggesting (Brief 27, 30) that this case be remanded to the Commission for reconsideration even though the Commission refused to reconsider when Respondent asked it to do so–a refusal which the Government applauds (Brief, 28). While Respondent would, of course, prefer a remand rather than the reinstatement of the district court decision, we see no possible need for such action. The Commission's errors were clear errors of law, which the Commission refused to examine when asked to do so in the light of *VW* and which, as *VW* makes clear, this court has full power to correct. Courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *VW*, 390 U.S. at 272, quoting *N.L.R.B. v. Brown*, 380 U.S. 278, 291.

V. RESPONDENT'S TARIFF WAS LEGALLY BINDING AND NULLIFIED THE CONFLICTING TERMS OF THE TERMINALS' VOLUNTARY TARIFF

Respondents' answer (App. I, 29, 31-32) presented to the district court the contention that the terminals' tariff was not legally binding, whereas Respondents' tariff, in conflict with the terminals' tariff, was binding under Sec. 18(b) of the Shipping Act. The district court ignored the issue, in common with all others which Respondent tendered.

Transportation statutes which require the filing of tariffs by common carriers always provide that it shall be unlawful for carriers who must file such tariffs to deviate from tariff terms. The Shipping Act in Sec. 18(b)(1) requires common carriers by water to file tariffs, and in Sec. 18(b)(3) requires that they obey the tariff terms. Compare Intercoastal Shipping Act, Section 2, 46 U.S.C. 844; Interstate Commerce Act, Sec. 6(7), 49 U.S.C. Sec. 6(7); Sec. 217(b), 49 U.S.C. Sec. 317(b); Sec. 306(e), 49 U.S.C. Sec. 906(e); Sec. 405(c), 49 U.S.C. Sec. 1005(c); Federal Aviation Act, Sec. 403(b), 49 U.S.C. Sec. 1373(b). No statute requires the filing of tariffs by marine terminal operators, or adherence to tariff terms. See *Aleutian Homes, Inc. v. Coastwise Line,* 5 F.M.B. 602, 613 (1956).

The district court treated the "tariff" filed by the terminals as if it were the conventional type of tariff, having the force of law, and hence binding on the users of the services it covers. The district court considered its inquiry as to the disputed charge involved here at an end once it determined, as had the Commission, that the charge covered by the tariff was not in violation of specified sections of the Shipping Act. But the tariff is not a conventional type of tariff, and has not the force and effect of law. The tariff was filed with the Commission solely by virtue of the commitment made to each other by the parties to Agreement 8785

that they would report to the Commission the rates upon which they had collectively agreed.[27]

Accordingly, even if the disputed charge were not *per se* illegal, the mere reporting to the Commission of the agreement among the terminals collectively to adopt the charge would not bind any users of the terminal facilities to accept it. Since the vessel operators did not agree (and in fact objected) to the charge (App. II, 16), their obligation would then be determinable solely as a matter of contract law.

Section 18(b)(1) of the Shipping Act, 1916, 46 U.S.C. Sec. 817(b)(1) requires common carriers by water in foreign commerce to file a tariff "showing all the rates and charges of such carrier or conference of carriers to or from United States ports and foreign ports . . ." The statute commands that:

> "Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement."[28]

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[27] A Commission General Order was issued *after* the transactions here involved requiring terminals to file tariffs, but not demanding that they be obeyed. 46 C.F.R. Secs. 533.1 ff.

[28] The Commission regulations governing the filing of Sec. 18(b) tariffs specify the contents of tariffs filed pursuant to this section, and provide, in relevant part: "Tariffs shall clearly state all of the services provided to the shipper and included in the transportation rates set forth therein." General Order 13, 46 C.F.R. 536.4(b)(9)(ix).

Pursuant to this statutory directive, Respondent had, as a participating carrier in the Scandinavian Baltic/U.S. North Atlantic Westbound Freight Conference, filed a tariff naming its rates and charges for transportation in foreign commerce between U.S. North Atlantic ports, including Boston, and ports in Europe. The tariff, as required by Sec. 18(b)(1), stated the services covered by the published rates. In relevant part, the tariff provided:

> "The rates in this tariff are port to port rates as customary and unless otherwise specifically stated *do not include terminal or other charges that are for the account of the owner of the cargo.*" (Italics supplied; App. II, 79).

Similarly, Respondent had on file in a tariff its bill of lading which provided that:

> ". . . the carrier has no responsibility whatsoever for the goods prior to the loading on and subsequent to the discharge from the vessel." (App. II, 80).

Under the tariffs and bill of lading of Respondent, then, the rates and charges which the cargo interest was obligated to pay for Respondent's services did not include any terminal services. Rather, terminal charges were specifically stated to be for the account of the cargo. Cases which hold that tariffs are legally binding on the carriers who publish or participate in them and on their customers as well, are legion. *Montana-Dakota, supra,* stated the rule thus (341 U.S. at 251):

> It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

In *United States v. Associated Air Transport, Inc.*, 275 F.2d 827, 833 (5th Cir., 1960). The court said:

> "The tariffs [of air carriers filed pursuant to the Federal Aviation Act] are both conclusive and exclusive; they may not be added to through reference

to outside contracts or agreements or understandings or promises.[15]"

Footnote 15 (omitted here) to the quoted excerpt cited seven Supreme Court and two lower court cases designated as being "among countless cases." The Maritime Commission clearly recognizes this rule (when so disposed). *Ocean Freight Consultants v. Bank Line, Inc.*, 9 F.M.C. 211 (1966).

There is thus no question that Respondent was not required–or permitted–to pay, on behalf of the cargo interest, for terminal services such as wharf demurrage performed beyond ship's tackle. Such payment would clearly constitute a violation of Sec. 18(b)(3) of the Act, which requires common carriers by water in foreign commerce to adhere to the rates published in tariffs and prohibits such carriers from "extend[ing] or deny[ing] to any person any privilege or facility, except in accordance with such tariffs." Even before tariffs in foreign commerce were required, the Commission itself recognized that terminals cannot make an allocation of terminal charges which is inconsistent with the carrier-shipper contract. Where the division of responsibility between carrier and shipper for terminal charges is covered "by express contract between shipper and carrier, as in a tackle-to-tackle contract of affreightment, the terminal's charges must be adjusted to fall on that party for whom, under the contract of affreightment, they have been incurred." *Terminal Rate Structure, Pacific Northwest Ports*, 5 F.M.B. 53, 56 (1956). The conclusiveness of the contract (i.e., bill of lading) when, as here, it constitutes a part of the tariff, was reinforced when the filing and observance of the tariffs of carriers in foreign commerce became mandatory under the Shipping Act.

Respondent contends that even if the terminals' tariff had, like Respondent's, the force of law–which it does not–such a terminal tariff could not change the mutual obligations as between the vessel operator and the cargo interest. But the terminals' tariff does not have the force

of law; it exists merely by virtue of a private contract, publicly approved to confer immunity for actions which would otherwise be *per se* antitrust violations. The basic regulatory scheme of the Shipping Act would be negated if terminal operators, by such agreements, could override public tariffs filed by congressional mandate and statutorily invested with the force of law.

A vessel operator who voluntarily paid wharf demurrage when his tariff excluded it would violate the anti-rebating provisions of section 18(b)(3) of the Act. The identical violation would result from reinstatement of the district court's judgment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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